Supreme Court of the United States

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IN THE

Supreme Court of the United States

October Term 1960

NO. 763

J. M. CHANDLER, *Petitioner*

v.

J. (JEROME) O. BROWN, DARYL DAVIS, B. A. ROSS, D. A. ROSS, EL CAPITAN OIL COMPANY, A Delaware Corporation, LONE STAR PRODUCING COMPANY, a Corporation duly incorporated under the laws of the State of Texas, GEORGE KOGAN, WILMA LAKIN, and HUSBAND, LAKIN, PHILIP SCHACTER, RAY T. DEVINE, HARRY LEVIN, EDWARD J. LEVIN, and GEORGE BURTON, *Respondents*

PETITION FOR REHEARING OF ORDER DATED APRIL 17, 1961 DENYING APPLICATION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, J. M. Chandler, respectfully prays and moves for a re-hearing of the order of this Court of April 17, 1961, denying the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Authority

Authority for filing and granting of this petition for re-hearing, is paragraphs (1) and (2) of Rule 58, Title 28 *U.S.C.*, Title 28 *U.S.C.A.*, *Revised Rules of the Supreme Court.* That Order was entered by this Court on the 17th day of April, 1961, denying Petition for Writ of Certiorari. That on or about the 12th day of May, 1961, by order of the Chief Justice, Earl Warren, of this Court, the time for filing petition for rehearing herein was enlarged and extended up to and including the 12th day of June, 1961.

I.

The denial by this Court of Petitioner's application for Writ of Certiorari leaves unresolved and unanswered an important question of law in which the Bar and the public are vitally interested. The primary question presented, which we submit this Court should take jurisdiction and answer, is whether Petitioner who has been denied his right to equal protection of Laws of Texas as guaranteed to him by the Fourteenth Amendment of the Constitution of the United States and deprived of his property without due process of law in violation of said Sec. 1, 14th Amendment of the Federal Constitution, may not have his complaint heard on the merits, simply because this Court has denied the application for a Writ of Certiorari in the case originating in the Courts of the State of Texas, wherein the very Federal rights, the denial of which are complained of here, have been denied him, by the State Courts. The judgment of the State Court is repugnant to and in violation of the provisions of Section 1, of the Fourteenth Amendment to the Constitution of the United States. In the case at bar, as in the proceedings in the State Court on which the judgment complained of here is predicated,

Petitioner was entitled to present questions of fact, which had to be resolved by a competent trier of the facts. He was denied his right to do so.

The granting of the motion for Summary Judgment by the trial court, under the circumstances existing in this case prevented Petitioner from presenting the contested fact issues for determination by a court of competent jurisdiction.

The affirmance of the order of the trial court holding that the previous proceeding in the Courts of the State of Texas is "res adjudicata" of the matters complained of in the complaint filed in the Federal Court, from which judgment this appeal is prosecuted, effectively denied Petitioner his right to have the disputed fact issues determined. The denial of this Petition for Writ of Certiorari leaves as valid and outstanding the action of the trial court, the court of appeals and that of the State Courts of Texas of Petitioner's denial of a hearing on disputed fact issues, in violation of and repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States. Such action is directly contrary to this Court's decisions in the following cases:

Daniels v. Allen, 344 U.S. 443, p. 491; 73 S. Ct. 437, pp. 438-439;

Atlantic Coast Line Company v. Powe, 283 U.S. 401, p. 404; 75 L. Ed. 1142; 51 S. Ct. 498;

United States v. Carver, 260 U.S. 482, 490; 67 L. Ed. 361, p. 364; 43 S. Ct. 181;

Hamilton Brown Shoe Company v. Wolf Bros. & Co., 240 U.S. 251, p. 258; 36 S. Ct. 269, p. 271; 60 L. Ed. 629, p. 634;

United States v. Shubert, 348 U.S. 222; 99 L. Ed. 279; 75 S. Ct. 277, p. 284;

Brown v. Allen, 344 U.S. 443, p. 456; 73 S. Ct. 397, p. 407; Rehearing denied 345 U.S. 946, 73 S. Ct. 837;
United States v. Carber, 260 U.S. 482, 480; 67 L. Ed. 361, 364; 43 S. Ct. 181;
State of Maryland v. Baltimore Radio Show, Md. 1950, 70 S. Ct. 252; 338 U.S. 912; 94 L. Ed. 562.

Preliminary Statement

The facts are simple. On the 14th day of December, 1951 Petitioner filed suit in the State Court in the orthodox ordinary form of Trespass to Try Title. On the 22nd day of April 1955 Petitioner filed a similar suit naming additional parties in the United States District Court for the Western District of Texas, Pecos Division. Issues were joined in both Courts. The suit filed in the State Court of Texas came on for hearing by way of Motion for Summary Judgment. Petitioner pleaded a legal title to the property and, alternatively, pleaded legal title to the property by virtue of a lost or destroyed deed. Notwithstanding such pleading the trial court granted Motion for Summary Judgment, in face of the admissions by Mr. F. H. Pannell, counsel for respondents, in open court at such hearing, of the existence of genuine issues of fact between the parties to the litigation, stating as follows:

> "Judge, that is correct. There are issues of fact in this case. There are sharp conflicts in the depositions in this case. Mr. Chandler says that Mr. J. O. Brown in 1930 or thereabouts gave him a deed to this property which he has lost and J. O. Brown denies that under oath. The question is not whether or not there are issues of fact which could affect the ultimate outcome of the case, and on that point the answer is 'no'. It doesn't make any difference about that because this

> Plaintiff is barred, as a matter of law, from bringing this suit at this time against J. O. Brown and he is barred for that reason and the additional reason as against Davis and Ross because they are innocent purchasers of value without notice of this alleged, so-called and supposed lost deed." (Petitioner's exhibit P-1, Vol. 2, pp. 375-376)

At the hearing on the motion to dismiss in the court below Petitioner offered, for the limited purpose of showing the existence of genuine fact issues in the State Court proceedings Ex. P. 1; Tr. ex. P-2, including, the orders and Judgments of the State Courts, in the Summary Judgment proceedings Cause No. 6390 District Court, Midland County, Texas, and for the further limited purpose of clearly illustrating how Petitioner was denied his Federally created rights. Tr. 158. Petitioner also introduced in evidence this Court's denial of his Application for Writ of Certiorari from the action of the Highest Tribunal of the State of Texas Ex P-13, Tr. 179 for the sole purpose of showing that the case at Bar was not subject to the Plea of "Res Adjudicata".

The summary judgment in the State Court was affirmed on appeal to the Court of Civil Appeals for the eighth judicial district of Texas, in cause styled *Chandler v. Brown, et al.*, 301 S.W. 2d 720. The Supreme Court of Texas refused application for Writ of Error and overruled a motion for rehearing. A motion for leave to file a second motion for rehearing, which was combined with Petitioners second motion for rehearing was likewise refused. Petitioner timely filed an Application for Writ of Certiorari to this Court which was denied, 356 U.S. 930; 2 L. Ed. 2d 761; 78 S. Ct. 773. Petitioner, having failed in the Texas Courts to obtain a hearing on the merits proceeded with his case in the Federal Court and sought

leave to file an amended pleading alleging further facts which required a determination on the merits before final judgment could be rendered. The trial court (United States) denied Petitioner's application to file the amended pleading, and upon motion to dismiss the Court sustained said motion on the sole ground of res adjudicata based on the opinion of the Court of Appeals (301 S.W. 2d 720) notwithstanding Petitioner's answer (Tr. 106-127) setting up the denial of his Federal Rights to be heard on the merits of his complaint alleging he had been deprived of his property without due process of law prohibited by Section I of the 14th Amendment to the Federal Constitution fully setting out his denial of equal protection of the laws of the State of Texas. Petitioner further pointed out the disputed facts which had to be resolved before a final judgment could be entered. On timely appeal to the United States Court of Appeals for the Fifth Circuit, that Court affirmed (282 F. 2d 186). Motion for rehearing was timely filed and overruled. The application for Writ of Certiorari in this case was timely filed and later denied.

II.

Questions Presented

1.

When the highest court of a state invariably holds that motion for summary judgment is not to be granted when there are fact issues to be determined does the denial of a hearing on the merits in the face of existing disputed fact issues constitute a denial of the equal protection of the law guaranteed by Section I of the 14th Amendment to the Constitution of the United States?

2.

When the highest court of a state invariably holds that motion for summary judgment is not to be granted when there are fact issues to be passed on, does the granting of a Summary judgment foreclosing Petitioner's property rights and denying him a hearing on the merits in the face of existing disputed fact issues constitute a taking of property without due process of law?.

3.

Did the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas by erroneously applying the statutes of limitation and especially the four-year limitation statute to Petitioner's suit of trespass to try title seeking title to an undivided mineral interest which had long before been severed from the surface, deny Petitioner equal protection of the laws of the State of Texas and result in the taking of his property without due process of law in violation of the provisions of Section 1 of the Fourteenth Amendment of the Federal Constitution.

4.

Under the liberal construction applicable to the Federal Rules of Civil Procedure regarding Amendments so that justice may be done was not Petitioner entitled to file amended and/or supplemental pleadings in the case at Bar in order to properly develop the issues involved in this controversy and to afford petitioner a full, fair and impartial trial of the fact issues involved in this controversy on the merits.

III.

Argument and Authorities

If, as contended, Petitioner was entitled to offer proof of the pleaded facts showing his right to recover and such right was denied him, then he has been denied his day in court. Because of his denial of an opportunity to present his evidence, his right to the property, or his right to litigate his right to said property has been denied him. That in effect amounts to taking Petitioner's property and giving it to Respondents, contrary to the decisions before and certainly since the enactment of the Fourteenth Amendment to the Constitution of the United States.

Calder and wife v. Bull and wife (1798), 3 Dallas 386, at p. 388, 1 L. Ed. 648 at p. 649;
Wilkinson v. Leeland, 1 Peters 627, at p. 657, 7 L. Ed. 542, at page 553.

Under the applicable Texas law a summary judgment cannot be granted whenever there is any fact issue to be resolved.

Sartor, et al. v. Arkansas Natural Gas Corporation, 321 U.S. 620, 64 S. Ct. 724;
Whitaker v. Coleman, 115 F. 2d 305;
King, et ux v. Robinsky, 241 S.W. 2d 220 (Civ. App. 1951);
Smith, et al. v. Bolin, et al., 271 S.W. 2d 93 (Sup. Ct. Texas);
Gulbenkian v. Penn, 252 S.W. 2d 929, 151 Tex. 412;
Bessie E. Ward, et vir v. A. E. Stroud, 274 S.W. 2d 136;
Roberson v. All States Insurance Company, 278 S.W. 2d 179;

Jindra v. Jindra, 267 S.W. 2d 287;
LeBus v. LeBus, et al., 269 S.W. 2d 506;
English v. Smith Food Stores, 289 S.W. 2d 792 at p. 794;
Ragsdale v. McLaughlin, 285 S.W. 2d 467;
Schepps v. American District Telegraph Co., 286 S.W. 2d 684;
Buckner Orphan Home v. Berry, 332 S.W. 2d 771, p. 775.

If, as it must be conceded, under the applicable Texas law as announced by the highest court of the State of Texas, this Petitioner was entitled to a hearing on the facts as pleaded, and the Texas Courts having denied him such right, which under the authorities is available to all other litigants, it is an inescapable conclusion that this Petitioner has been denied the equal protection of the laws of the State of Texas and had his property taken without due process of law, contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Cooper, et al. v. Aaron, 358 U.S. 1, 78 S. Ct. 1401, at p. 1410.

Petitioner had properly and timely raised the question of his Federal Rights in the state Courts on the former state summary proceedings.

1. In his answers to motions for summary judgment as shown in the transcript of the record in the District Court of Midland County, Texas, in Cause No. 6390 (petitioner's Exhibit P-2, pp. 58, 73, 82, 96 and 106. Offered in evidence for limited purpose (Tr. p. 166.)

2. In his argument to the court on the summary hearing (petitioner's Exhibit P-1.)
3. Petitioner likewise raised and urged his Federal rights throughout the appellate Courts in the State of Texas.
4. Petitioner reiterated and magnified such Federal rights and the denial thereof in his second motion for rehearing in the court of last resort, being the Supreme Court of Texas. (Ex. P.11) (Tr. 176.) Such federal questions were and had to be passed upon by the Supreme Court of Texas by refusing petitioner leave to file such motion because same was so combined with the motion requesting leave to file said second motion for rehearing. The Supreme Court of Texas therefore, did pass upon the question of petitioner's federal rights and denied same. (Ex. P-8) (offered Tr. 172-4.) If petitioner's Federal rights and the denial thereof had not been raised earlier in the proceedings and prior to the offering for filing of his second motion for rehearing, combined with his motion for leave to file same, such federal questions and his federal rights would have been sufficiently and timely raised.

Saunders v. Shaw, 244 U.S. 317, 37 S. Ct. 638, 61 L. Ed. 1163;
Home Telephone & Telegraph Company v. City of Los Angeles, 227 U.S. 278, 57 L. Ed. 510, 33 S. Ct. 312.

Petitioner could not anticipate that the Supreme Court of Texas would ignore the settled laws of Texas, with reference to summary judgments, and would deny Peti-

tioner his federal rights of equal protection of the laws of the State of Texas and deprive petitioner of his property, without due process of law, until such act was actually consumated by denying or refusing his motion for rehearing on his application for writ of error timely filed in that Court.

Perhaps something ought to be mentioned about the statement found in the opinion of the Court of Civil Appeals, 301 S.W. 2d 720 on page 723, reading as follows:

> "We believe that appellant has lost his right to prove up the alleged lost deed by reason of the four-year statute of limitation."

The above quoted holding by the Court of Civil Appeals contravenes the settled rule of law applicable to severed mineral rights.

Texas Juris., Vol. 2, Sec. 59, p. 123 at p. 124, as follows:

> "On the other hand it is settled law that if the minerals have been severed by a deed of conveyance, lease, or judgment possession of the land for the time required by the statute of limitations will not give title to the minerals by adverse possession. Under such circumstances something more than mere possession and use of the surface is required to obtain title to the severed mineral estate. Such dominion must be exercised over the minerals as will constitute notice to the owner of the mineral estate that the possessor of the surface is claiming the minerals also. Notice is not imparted to the owner of the mineral estate by the fact that the claimant held under a deed making no mention of mineral rights or that he executed oil leases that were recorded, and that he bored a well for the purpose of procuring either water or oil."

Lyle v. Dodge, 228 S.W. 316, no writ history;
Wallace v. Hoyt. 225 S.W. 425, error refused;
Elliott v. Nelson, et al., 113 Tex. 62, 251 S.W. 501;
Carminta v. Fenagle, 267 S.W. 2d 449;
Green v. White, 137 Tex. 361, 153 S.W. 2d 575, 136 ALR 626;
Hanks v. Magnolia Petroleum Co., 14 S.W. 2d 348, p. 353, affirmed 24 S.W. 2d 5;
Campsey v. Jack County Oil & Gas Association, 328 S.W. 2d 916.

The Court was attempting to apply Article 5529 of *Texas Revised Statutes* to the litigation then under consideration and this position was inaccurate for the following reasons, to-wit: The four-year statute of limitation by its very expressed terms does not apply to suits involving the title to real property; the laws of limitation and adverse possession in Texas do not apply to severed mineral rights unless and until some overt act is done by the adverse party to reduce such minerals to his possession.

In cases such as the one at bar the four-year statute of limitation is not applicable.

Carl v. Settegast, 237 S.W. 238, 241, opinion adopted as that of Supreme Court. (243);
Jackson v. Hernandez, et vir, 285 S.W. 2d 184, p. 191;
Campsey v. Jack County Oil & Gas Association, 328 S.W. 2d 912, 915.

In the case at bar the Texas court and the court below prejudged Petitioner's ability to succeed in his litigation, which is contrary to the decision of this Court in *Coe v. Armour Fertilizing Works*, 35 S. Ct. 625, 237 U.S. 413, 49 L. Ed. 1027. The Court in passing upon such matters said:

"To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. Rees v. Watertown, 19 Wall. 107, 123, 22 L. Ed. 72, 77."

II.

The trial court's denial to permit Petitioner to file his Third Amended Petition prejudiced his rights because it failed to afford him the opportunity to plead all material facts and denied him a full hearing and disclosure of the facts before the trial court. Petitioner had repeatedly requested leave of the Federal District Court to file amended and/or supplemental pleadings, both as to his petition or bill of complaint and also his controverting answer and affidavit to the motion of Respondent, J. O. Brown, for summary judgment (Tr. 107, 137, 138, 139). Upon each such request, however, the Federal District Judge denied Petitioner such leave, to which Petitioner excepted (Tr. pp. 143 and 192). It is only after a full hearing and full disclosure of facts relevant and material to the determination of a cause of action that justice can be administered with impartiality. This fundamental right has been denied to Petitioner.

The United States of America v. E. G. Houghman, et al., 361 U.S. 958, 81 S. Ct. 13, 4 L. Ed. 2d 541;
Suse Maty, Admnx. v. Gosselli Chemical Co., 303 U.S. 197, 58 S. Ct. 507, 82 L. Ed. 745.

III.

Petitioner, in the Court below, seasonably filed a motion (Tr. pp. 129-130) after Respondent suggested the death

of J. O. Brown, seeking leave to take depositions of proper parties in order to determine Brown's heirs at law so that an amended complaint could be filed making such heirs or assigns parties to the suit. This the Court denied. It having been made known to the Court that Respondent, J. O. Brown, was not alive at the time the motion to dismiss was either filed and/or argued, Brown, or those who stand in his shoes are not now in position to seek to sustain the trial court's action in entering an order of dismissal. (See also Petitioner's answer to Respondent's Motion to Dismiss, Tr. p. 107.)

Saverio D. Iovino, et al. v. George Waterson, Jr., 274 F. 2d 41, Cert. Den. 80 S. Ct. 860, 362 U.S. 949, 4 L. Ed. 867;
Perry v. Allen, 239 F. 2d 107.

IV.

This petition for rehearing therefore presents a question of law to this Court as to whether a litigant is entitled to present material facts in a matter upon which reasonable minds may differ and arrive at different conclusions. Unless each litigant's rights are jealously guarded by giving each litigant the opportunity to present whatever material facts he may have justice can not prevail.

Conclusion

For the foregoing reasons, and the reasons set out in the petition for Writ of Certiorari, it is respectfully prayed that the order of this Court denying Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit be set aside and this petition for Certiorari granted, and upon hearing, the order or decision of the Court of Ap-

peals for the Fifth Circuit be vacated, and the case remanded to the trial court for hearing on the merits, with direction to permit Petitioner to file his amended Petition and that Petitioner be permitted to make the heirs, assigns, executors and/or administrators of Respondent Brown parties to this action.

Respectfully submitted,

MANDELL & WRIGHT,

By _____
Attorneys for Petitioner
707 South Coast Building
Houston 2, Texas

_____
J. M. CHANDLER
P. O. Box 2018
Fort Worth, Texas

Certificate of Counsel

The undersigned, Arthur J. Mandell, Attorney for Petitioner, hereby certifies that the Petition for Rehearing herein filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in Paragraphs I and II of Rule 58, Title 28, U.S.C., and Title 28, U.S.C.A., Revised Supreme Court Rules and that said petition for rehearing is not interposed for delay.

ARTHUR J. MANDELL
Attorney for Petitioner

Certificate of Service

I, Arthur J. Mandell, hereby certify that a true copy of the foregoing Petition for Rehearing of the Order denying certiorari herein as entered on the 17th day of April, 1961, has been served upon F. H. Pannill, c/o Messrs. Stubbeman, McRae & Sealy, Attorneys at Law, Midland, Texas, and J. R. Black, c/o Messrs. Scarborough & Black, Attorneys at Law, Abilene, Texas, Counsel for Respondents, and upon each Respondent individually at their last known addresses, and as to Respondents who reside at a greater distance than five hundred (500) miles, such copies have been sent Air Mail by depositing such true copy thereof in the United States mails, first class postage prepaid, addressed to them on this the_____day of June, 1961.

ARTHUR J. MANDELL
Attorney for Petitioner